IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Paper #9
6/30/09

Application No.	:	**10/054,328**
Filing Date	:	**20 JAN 2002**
First Named Inventor	:	**Alfred A. MARGARYAN**
Assignee	:	**AFO RESEARCH, INC.**
Art Unit	:	**1755**
Examiner	:	**Elizabeth A. BOLDEN**

REQUEST FOR RECONSIDERATION

This is a Request For Reconsideration of the Decision mailed April 1, 2009 denying Petitioner's renewed petition to revive the above-identified application under 37 CFR 1.137(a) and (b) filed February 17, 2009.

The April 1, 2009 denial of Petitioner's February 17, 2009 renewed petition to revive is predicated on a misunderstanding of corporate law principles and the fiduciary obligations of corporate officers and directors, such as Dr. Lindsey, to their employer, i.e., Nano Technologies, LLC, and its shareholders, e.g., Mr. Jack Illare. These common law, statutory and contractual principles preclude treating Dr. Lindsey as a "third party" rather than as a corporate and contractual fiduciary.

The constraints placed on Lindsey's authority by Nano's Limited Liability Company Operating Agreement, authenticated by the Supplemental Declaration of Mr. Illare

attached hereto, further preclude any conclusion that Lindsey was "in total control" of Nano's single most important asset, the application at issue, and more particularly, its intentional abandonment, as asserted in the April 1, 2009 Denial.

These facts and legal principles readily distinguish the *Winkler* case relied on by the Director of Office of Petitions ("Director") and places this case squarely within the holdings of the *Future Technology* case also cited, but effectively ignored, by the Director. In the April 1, 2009 Denial, the Director states:

> "The record shows that there were *three parties* involved in the prosecution of the patent application at the time of abandonment. Dennis Beach [sic] ... the patent attorney, Jack Illare (Illare) was the Executive of the assignee, Nano Teknologies, LLC (Nano), and Dr. Lindsey (Lindsey), an employee of Nano who was apparently a go-between or liaison between Beech and Illare.... the application was abandoned due to Lindsey's misconduct....
>
> Where the applicant permits *a third party* to *control* the prosecution of an application, the *third party's* decision whether or not to file a reply to avoid abandonment is binding on the applicant. See Winkler, 221 F. Supp. at 552, 138 USPQ at 667. Where an applicant enters an *agreement* with a *third party* for the *third party* to take *control* of the prosecution an application, the applicant will be considered to have given the *third party* the *right* and *authority* to prosecute the application to avoid abandonment (or not prosecute) *unless*, by the express terms of the contract, the *third party* is conducting the prosecution of the applicant solely in a *fiduciary capacity.* See Futures Technology Ltd. V. Quigg, 684 F. Supp. 430, 431, 7USPQ2d 1588, 1589 (E.D.Va. 1988). Otherwise, the applicant will be considered to have given the *third party unbridled discretion* to prosecute (or not prosecute) the application to avoid abandonment, and will be bound by the inactions or inactions of the *third party.*" (Italics added, underscoring the Director's.)

Here the only *party* was a corporate entity, Nano.[1] Lindsey and Illare were each officers, directors and employees of Nano at all times relevant. They were not and are not *third parties* with respect to Nano, nor distinct from it. A corporation can only act through its duly authorized officers and employees.[2] Moreover, corporate officers and directors, such as Lindsey, are fiduciaries whose powers are "powers in trust" with respect to the business and assets of the corporation for the benefit of shareholders to whom such officers and directors owe *fiduciary duties*, including the duties of good faith, due care and the duty to act *intra vires* i.e., within their respective authority.[3] Corporate officers and directors can only act within the authority granted to them by statute, the corporation's articles and by-laws (in this case, the LLC Operating Agreement), or their employment contracts.[4] [5]Accordingly, Lindsey at no time had the "unbridled discretion" erroneously assumed to exist by the Director. By law and contract, Lindsey's actions were at all times circumscribed by Nano's Operating Agreement and by his fiduciary duties to his corporate employer, Nano, and its principle shareholder, Illare.

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[1] On June 2, 2009 Nano assigned its interest in the instant application to AFO Research, Inc., also a Florida Limited Liability Company, of which Jack Illare is the Managing Member. AFO Research , Inc. therefore assumes the role of Petitioner in this case.

[2] "It is axiomatic 'that a corporation can only act through its officers and agents . . . ' " *Country Manors Ass'n, Inc. v Master Antenna Systems, Inc.*, 534 So.2d 1187, 1191 (Fla.App. 4 Dist., 1988), quoting *Kent Insurance Company v Schroeder*, 469 So.2d 209, 210 (Fla. 5th DCA 1985), quoting in turn, *Browning v State*, 101 Fla. 1051, 133 So. 847, 848 (1931).

[3] The Florida Limited Liability Company Act provides that "each member and managing member shall owe *a duty of loyalty* and a *duty of care* to the limited liability company and the other members of the limited liability company." 2000 Fla. Stat. § 608, 4225(1) (emphasis added). See also, Henn, Law of Corporations, (2d ed.1970), at sections 233, 234 and 235, at pages 453 *et. seq. Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949); *Pepper v. Litton*, 308 U.S. 295, 306 (1949); *Chenery Corporation v. SEC.* 128 F.2d 303,309, 314, n. 19 (D.C. Cir. 1942) *cert. granted*, 317 U.S. 609, *remanded.* 318 U.S. 80.

[4] Although Lindsey's employment contract has been lost or destroyed by Lindsey, who left both the company and the country and died in the Philippines, there is no reason to believe that his contract was different in any material respect from Illare's contract, which is in the record, regarding his fiduciary obligations with regard to Nano's intellectual property.

[5] "A corporation must act in accordance with its articles of incorporation and duly adopted by-laws." *Word of Life Ministry v Miller*, 778 So.2d 360, 363 (Fla. App. 1 Dist., 2001). "The corporation and its directors and officers are bound by and must comply with the charter and bylaws." *Word of Life Ministry v Miller*, 778 So.2d 360, 363 (Fla. App. 1 Dist., 2001), quoting *Yarnall Warehouse & Transfer v Three Ivory Bro. Moving Co.*, 226 So. 2d 887, 890 (Fla. 2d DCA 1969).

This situation is entirely unlike the *Winkler* case relied upon by the Director in which an inventor attempted to revive two applications that had been intentionally abandoned by the legally appointed receiver of a *third party* corporation to whom the plaintiff, had contractually granted the authority to prosecute those applications --without any constraints. There were no fiduciary obligations owed to the plaintiff by that third party corporation or by its statutorily appointed assignee/receiver. The receiver's obligations were to the corporation's creditors, not the plaintiff. Pursuant to that obligation and his statutory authority, the receiver made a conscious decision, to which the plaintiff did not object, to intentionally abandon the applications at issue. These facts bear little resemblance to this case.[6]

By contrast, Lindsey had both circumscribed authority and clear fiduciary obligations to Nano, and its shareholder, Illare, under Nano's Operating Agreement, Florida's Limited Liability Company Act and the terms of his employment agreement.[7] This circumstance not only distinguishes *Winkler*, but clearly implicates *Futures Technology*, which bears striking similarities to this case. There, the Eastern District of Virginia held there could be no abandonment by one in breach of a fiduciary duty to the equitable owner of the patent. *Id.*, at 431. In that case the plaintiff's predecessor entered into a contract with a third party to develop certain inventions and prosecute patent applications *with funds provided by the plaintiff (here Illare), holding any patents it obtained in a fiduciary capacity* for the plaintiff's predecessor, who was to be the

[6] The only person to whom *Winkler* has any application in the instant case is the inventor, Alfred Margaryan, who agreed to *assign* "all of his right title and interest" in the patent application to Nano, thereby giving Nano, the right to prosecute or not prosecute the instant application with no obligation to Margaryan. Margaryan is not a party to this case.

[7] See footnote 3.

equitable owner of the inventions and patent applications. That equitable owner "had a right to expect [the fiduciary's] performance under [its] contract," just as Nano and Illare had the right to expect Lindsey's performance under applicable corporate principles and Nano's Operating Agreement, to which Lindsey was a signatory.

In *Futures Technology*, as here, the aggrieved party "became troubled by [the fiduciary's] performance," "requested information from [the fiduciary]" and the its patent prosecution "attorney [who] refused to divulge information ...based on the attorney's confidential relationship with" [the fiduciary"] ... regarding the status of the application," and "was given assurances [by the fiduciary] that the work was being done on the application, when in fact, such work was not being done." *Id.* These facts virtually mirror the present case.

On these facts the Petitioner correctly asserted that the ensuing abandonment had been both unintentional and unavoidable. The Commissioner disagreed. The Court overruled the Commissioner, holding that the plaintiff was the equitable owner of the application and that *it* never intended to abandon the application, citing the plaintiff's inquiries and the false assurances made to it by the fiduciary. This holding, which is controlling precedent in the Eastern District of Virginia, where review of the Director's decision will be venued, is directly applicable to the instant case.

As noted, Dr. Lindsey' fiduciary obligations to Nano and Illare and his lack of authority to unilaterally abandon the application at issue on behalf of Nano are

established by common law corporate principles, by the Florida Limited Liability Company Act,[8] and by Nano's LLC Operating Agreement. Allure's August 15, 2003 Employment Agreement, which was also signed by Lindsey as President of Nano, further provides that:

> "[A]ll inventions...conceived during or reduced to practice during working hours or using the Company's data or facilities... related to the Company's present or planned business ... shall be the sole property of the Company and shall at all times and for all purposes be regarded and held by the Executive in a *fiduciary capacity* for the sole benefit of the Company." (emphasis added)

As noted in footnote 3, Lindsey's counterpart employment agreement has not been located as a result of his departure from the company, his move to the Philippines and his subsequent death. However, there is no reason to assume that Lindsey's contract conflicts with these provisions, which in turn reflect the parallel, but broader provisions of Florida's Limited Liability Company Act, which provides that all such property (not just intellectual property) is the property of the limited liability company.[9]

Lindsey's lack of authority to unilaterally dispose of Nano's major corporate asset, i.e., the patent application at issue, which he had a fiduciary obligation to preserve and protect, is further established by Nano's Limited Liability Company Operation Agreement, which provides:

> "The Company shall engage in the business of developing, producing and selling patent licenses ...in nano material science.
> (Op. Agr. para. 1)

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[8] The Florida Limited Liability Company Act provides that "each member and managing member shall owe *a duty of loyalty* and a *duty of care* to the limited liability company and the other members of the limited liability company." 2000 Fla. Stat. §608, 4225(1). (emphasis added)

[9] See e.g. Florida Limited Liability Company Act, Sections 608.425 (1) and (2).

> The *Company's business and affairs* (as distinguished from its day-to-day operations) *shall be managed by a Board of Managers*. Each member of the Board of Mangers shall be a "manager" as defined in the Florida Limited Liability Company Act. The Board of Managers shall have the same power, authority and responsibility as the board of directors of a corporation. The initial Board of Managers will consist of *two members*: Lonnie Lindsey (Lindsey) and Jack Illare III (Illare) as Chairman of the Board.
> (Op. Agr. para. 2.1(a), emphasis added)

> The Board of Managers shall act upon all matters by majority ... (...*unanimous* in the case of two managers) vote ... [N]o action may be taken ... unless *all* Members of the Board are first given notice of, and *a reasonable opportunity to comment* upon, the proposed action.
> (Op. Agr. para. 2.1(b), emphasis added)

> The Board of Managers has appointed the following individuals to the offices indicated:
>
> Lindsey, President
> Lllare, Chairman of the Board/Managing Director . . .

> *All contracts and obligations of the business arising in the ordinary course shall require the Managing Director's approval.*
> (Op. Agr. para. 2.2 emphasis added)

The record is clear that Illare (as Managing Director) never gave his approval for any abandonment of Nano's major asset, the instant application, nor voted, as one of the two members of the Board of Managers, for any such abandonment as required by Nano's Operating Agreement for any such corporate action. Accordingly, whether the abandonment of Nano's major corporate asset is viewed as part of Nano's "business and affairs (as distinguished from its day-to-day operations)" or as simply "arising in the

ordinary course" of Nano's business, Nano, as the only "party" to this Petition,[10] never acquiesced in any such abandonment. Moreover, and as previously established, Illare had also been vested with corporate "responsib[ility] for day to day duties, as well as the strategic planning" of Nano, by August 15 ,2003. The is no evidence whatsoever that Illare acquiesced in the abandonment of the instant application in any of these capacities, as required by all of Nano's controlling corporate documents

Thus, there has been no *intentional* abandonment by the legal owner of the application and only actual "party," Nano, since Nano could only make the decision to abandon by notice to and consent or vote by Illare under its Operating Agreement. The abandonment was *also* unavoidable as *Nano* was *prevented* from responding to the office action of which its Managing Director was not aware by the misconduct of Lindsey who did not have the corporate authority to make the decision to abandon. Lindsey was clearly in breach of his fiduciary obligations to Nano and Illare, the majority stockholder and the sole provider of funding ($1,000,000) for the application and thus the equitable owner of the application, just as in *Future Technology*. Under these facts, the purported abandonment by Nano was both unintentional and unavoidable under 37 CFR 1.137(a) and (b).

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[10] AFO is, by virtue of the recent assignment of all of Nano's right, title and interest, Nano's successor and hence the same "party." Nano's patent prosecution attorney, Beech, is no more a "third party," as erroneously asserted by the Director, than AFO's current attorneys. Moreover, as Nano's attorneys, both this firm and Beech had and have well defined fiduciary and ethical responsibilities to Nano for matters entrusted to them under applicable ethical canons governing such legal representations. More importantly, there is no evidence that Beech intended to abandon the application. On the contrary, he made multiple good faith attempts to obtain necessary information and instructions to reply to the office action at issue, but was unavoidably prevented from doing so by Lindsey's failure to respond to his repeated inquiries and requests for instructions.

Addressing the Director's contention that Nano and its principal stockholder, Illare, did not exercise due diligence in their reliance of Lindsey to act in accordance with his fiduciary responsibilities, it must be noted that, unlike Lindsey's actions with respect to his diversion of Nano's funds to projects in which he had a self-interest outside of Nano, Lindsey's own self-interest was co-extensive with Nano's with respect to the instant application and mitigated in favor of preserving the application since he too was a stockholder in Nano and would have profited from the application's issuance as a patent and its commercialization. See Suppl. Declaration Illare at ¶ 4. That fact logically distinguishes the two situations and more than adequately explains Nano's and Illare's continued reliance on Lindsey in this latter respect.

It should also be recognized that while the Applicant's last two papers emphasize reliance on Section 1.137(a) in accordance with the suggestion of Petitions Examiner Freidman in his June 6, 2008 decision (at page 3), Petitioner has never abandoned its reliance on subsection (b), as evidenced by, *inter alia*, the first and the last paragraphs of Petitioner's February 9, 2009 paper. It should also be recognized that Mr. Friedman's recommended reliance on subsection (a), on which Petitioner's patent agent understandably relied, was misconceived since it only raised Petitioner's burden of proof without any countervailing advantage as there are no longer any time limits mandating such a choice. As a result of this misdirection by the designated representative of the PTO, Petitioner's emphasis shifted and, more importantly, the Director's latest decision addresses *only* the more stringent unavoidable of CFR 1.137 (a), rather than the less stringent unintentional standard of 1.137 (b). This fact alone should require

reconsideration of Petitioner's evidence in light of the unintentional standard of subsection (b).

For the foregoing reasons, it is respectfully submitted that the Director's final denial is based on errors of law, a failure to properly apply the law to the facts, and by a failure to employ the unintentional standard of CFR 1.137 (b). Here, the facts, the law and the equities all converge to require relief from the unintentional and unavoidable consequences of Lindsey's breach of his fiduciary obligations to AFO's predecessor, Nano and, through Nano, to Illare.

In summary, the abandonment of the application has been shown to have been both unintentional and unavoidable and, accordingly, Petitioner respectfully requests reconsideration of the Director's April 1, 2009 Decision denying the renewed petition and reinstatement of the application at issue based on Nano's unintentional and/or unavoidable abandonment, pursuant to 37 CFR 1.137(a) and/or (b).

Respectfully submitted,

NIXON & VANDERHYE P.C.

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application No.	:	10/054,328
Filing Date	:	20 JAN 2002
First Named Inventor	:	Alfred A. MARGARYAN
Assignee	:	AFO RESEARCH, INC.
Art Unit	:	1755
Examiner	:	Elizabeth A. BOLDEN
Office Action Mailing Date	:	01 JUL 2004

Title: **FLUOROPHOSPHATE GLASS AND METHOD FOR MAKING THEREOF**

SECOND SUPPLEMENTAL DECLARATION OF JACK JOSEPH ILLARE III

UNDER 37 CFR § 1.137 (a) and (b)

Attention: Office of Petitions
Mail Stop Petition
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

TO THE COMMISSIONER FOR PATENTS:

The following is a Second Supplemental Declaration in support of a concurrently filed Request for Reconsideration relating to the Petition for Revival of the above-identified application establishing unintentional and unavoidable delay under 37 CFR § 1.137(a) and (b). The purpose of this supplemental statement is to bring certain facts, including the relevant provisions of Nano Technologies Limited Liability Company Operating Agreement to the Director's and Commissioner's attention in connection with the Applicant's explanation why the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition under 37 CFR § 1.137(a) and (b) was both unintentional and unavoidable.

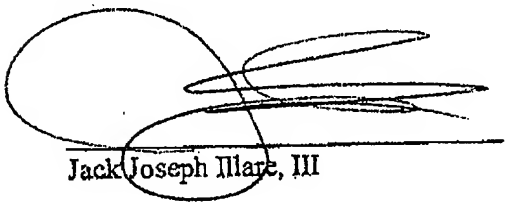
1. At all times relevant, I. was Chairman of the Board/Managing Director of Nano Technologies, LLC ("Nano"). I am presently the Managing Member of AFO Research, Inc. ("AFO"), the current assignee, from of the instant application. A true copy of the June 2, 2009 assignment from Nano to AFO is attached to the Revocation and New Power of Attorney filed concurrently herewith.

2. Attached is a true and correct copy of Nano Technologies' Limited Liability Company Operating Agreement.

3. As shown by the Operating Agreement, I contributed $1,000,000 to Nano in return for 100,000 Investor Common Units of Nano. See Paragraphs 3.1 (a) and 3.2 and Exhibit B to that Agreement. I was the only partner of "Red Angel Partners," the entity listed in that Exhibit B to the Operating Agreement.

4. As further shown by Exhibit A to the Operating Agreement, the holders of the 6,900,000 Founder Common Units included myself and Lonnie Lindsey and two other gentlemen who subsequently left Nano. As indicated in Paragraph 3.1 (a) of the Operating Agreement, the Founder Common Units and Investor Common Units are identical except as provided elsewhere in the Agreement. As provided in Paragraph 4.1 of the Agreement, any distributions of cash, securities, or other property was to be made in proportion to the number of common units, both Investor and Founder Units, once the net asset value of Nano reaches 110% of the aggregate capable contribution accounts of the members, those capital contributions to be returned prior to such distributions.

5. The undersigned hereby declares that all statements made herein of the party's own knowledge are true, all statements made herein on information and belief are believed to be true, and all statements made herein are made with the knowledge that whoever, in any matter within the jurisdiction of the Patent and Trademark Office, knowingly and willfully falsifies, conceals, over covers up by any trick, scheme or device or material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be subject to the penalties set forth under 18 U.S.C. 1001, and that violations of this paragraph may jeopardize the validity of the application or document, or the validity or enforceability of any patent, trademark, registration, or certificate resulting therefrom.



Jack Joseph Illare, III

06/29/09

Date

LIMITED LIABILITY COMPANY OPERATING AGREEMENT

OF

NANO TEKNOLOGIES, LLC

August 15, 2003
3rd Revision

LIMITED LIABILITY COMPANY OPERATING AGREEMENT
OF
NANO TEKNOLOGIES LLC

This is the Limited Liability Company Agreement (the "Agreement") of Nano Teknologies LLC (the "Company"). This Agreement was originally executed on January 1, 2001, revised on April 11, 2002 and currently revised August 15, 2003.

The parties to the agreement are those parties set forth on Exhibit "A". The members and all persons and entities hereafter admitted as a member of the Company in accordance with this agreement, are referred to as the "Members."

1.0 THE COMPANY AND ITS BUSINESS.

1.1 THE COMPANY.

The Company was formed by filing its Articles of Organization as a Florida Limited Liability Company on August 22, 2000 to pool certain of the Members' resources in the spirit of partnership to develop and market various technologies.

1.2 BUSINESS.

The Company shall engage in the business of developing, producing and selling patent licenses agreements for breakthrough technologies in nano material science, TFT and new generation vitreous materials. Research and development will mainly be directed towards technologies in the electronic/optical field of science. These technologies will focus on optical data storage, specialty vitreous material and Nano scale TFT in optics and and electronics. The company is authorized to engage in other business endeavors as determined by the Company's Board of Managers (defined below).

2.0 MANAGEMENT OF THE COMPANY AND RELATED MATTERS.

2.1 BOARD OF MANAGERS.

(a) The Company shall be a "manager-managed company" as defined in the Florida Limited Liability Company Act. The Company's business and affairs (as distinguished from its day-to-day operations) shall be managed by a Board of Managers. Each member of the Board of Managers shall be a "manager" as defined in the Florida Limited Liability Company Act. The Board of Managers shall have the same power, authority and responsibility of the board of directors of a corporation. The initial Board of Managers will consist of two members: Lonnie Lindsey (Lindsey) and Jack Illare III (Illare) as Chairman of the Board. The Board of Managers shall consist of between two and seven members; provided, however, until such time as the Members shall increase the number of members of the Board of Managers as provided in Section 2.1(e), the number of members of the Board of Managers shall be two.

(b) The Board of Managers shall act on all matters by majority (or unanimous in the case of two managers) vote of the total number of members of the board. Action may be taken by the Board of Managers at a meeting (at which members of the board may participate in person or by telephone), by polling all of the members of the board without a meeting, or by a writing signed by a majority of the members of the board, except that no action may be taken by a writing unless all Members of the board are first given notice of, and a reasonable opportunity to comment upon, the proposed action. The Board of Managers shall hold meetings at such intervals, and shall adopt such rules of procedure, as it may from time to time determine. Any member of the Board of Managers may designate another person to act as his or her substitute at any meeting or in connection with any action to be taken by the Board of Managers. Members of the Board of Managers shall not be compensated for their services as such.

(c) Without limiting the generality of the foregoing, the Board of Managers may at any time determine to effect an initial public offering of interests in the Company or of an entity to which the Company may transfer all or a portion of the assets and business of the Company, all on such terms and conditions as the Board of Managers may

determine. The Members shall take such action and execute such instruments as the Board of Managers may reasonably require in connection any such the initial public offering; provided, however, that any restrictions on sales of securities by Members in such offering shall apply also to sales of securities held by employees, managers, directors, or other insiders of the Company.

(d) For so long as a Member holds not less than 500,000 Common Units (defined below), such Member shall have the right, at such Member's expense, to visit and inspect any of the properties of the Company, to examine its books of account and records, and to discuss its affairs, finances and accounts with its officers, all at reasonable times, but in no event more frequently than once per fiscal quarter; provided, however, that the Company shall not be obligated to provide any information that it reasonable considers to be a trade secret or to be confidential.

(e) The Board of Managers will be elected annually by a vote of the Members holding a majority of the outstanding Common Units. Each Common Unit will have one vote. At such annual election, the members holding a majority of the outstanding Common Units may vote to increase the number of members of the Board of Managers, but said Board of Managers shall not consist of more than seven members. The date and location of such annual vote shall be determined by the Board of Managers.

2.2 OFFICERS.

The Board of Managers may appoint such officers of the Company as the board determines desirable, including, but not limited to, a president, one or more vice-presidents, a secretary, a treasurer, and one or more assistant secretaries and assistant treasurers. The officers of the Company need not be Members and shall have the powers and duties delegated to them by the Board of Managers. The officers of the Company shall serve at the pleasure of the Board of Managers. The Board of Managers has appointed the following individuals to the offices indicated:

Lindsey, President
Illare, Chairman of the Board/Managing Director

Illare will be responsible for managing the Company's day-to-day operations. Lindsey and Illare shall be the authorized signatory group of the Company with respect to banking relationships and be authorized to sign checks on behalf of the company. All checks will require the signatures of the two members of the signatory group. All contracts and obligations of the business arising in the ordinary course shall require the Managing Director's approval.

2.3 SALES REPRESENTATION; SHARED SERVICES.

The Company's Managing Director may retain other agents or hire salespeople for the sale, licensing or development of the Company's technologies. Provided however, any proposed contract for the payment of commissions to any agent, salesperson or consultant for the sale, licensing or development of any technology shall be approved by the Board of Managers and must be payable in accordance with customary practice in the industry.

2.4 EMPLOYMENT AGREEMENTS.

The Company has entered into no other employment agreements.

2.5 OTHER ACTIVITIES OF MEMBERS.

Any Member, including the members of the Board of Managers, may engage in or have an interest in other business ventures of any kind, independently or with others, and neither the Company nor any other Member shall have any rights in or to those independent ventures. The foregoing provision is subject to the provisions of Section 12.3 and any contrary provision of any employment agreement with the Company to which any Member or member of the Board of Managers may be a party.

3.0 *UNITS: SERVICES, CAPITAL CONTRIBUTIONS.*

3.1 *ALLOCATION OF UNITS.*

(a) This Agreement provides for the determination of certain matters on the basis of the number of Common Units held by each Member. As of the date hereof, only common units ("Common Units") have been issued. The Common Units which have been issued consist of two types: (i) those issued to or at the direction of the Founders in connection with the organization of the Company (the "Founder Common Units"), and (ii) those issued to investors in connection with a private placement conducted by the Company (the "Investor Common Units"). As of the date of the amendment and restatement of this Agreement, there are 6,900,000 Founder Common units outstanding and 100,000 Investor Units outstanding. The current ownership of the Founder Common Units is set forth on Exhibit "A". The current holders of the Investor Common Units are set forth on Exhibit "B". Each holder of Founder Common Units is referred to herein as a "Founder". Founder Common Units and Investor Common Units shall be identical in all respects except as specifically provided otherwise in this Agreement. There shall be a total of 10,000,000 authorized Common Units.

(b) The Board of Managers from time to time may issue to key employees and consultants of the Company up to an aggregate number of Common Units equal to 1,000,000, plus any additional Common Units that become available for reissuance, in each case for such consideration and on such terms (including vesting) as the Board of Managers may determine. If the Board of Managers determines to issue to key employees more than the available Common Units reserved, the percentage of the Common Units held by each Member determined on a fully diluted basis shall be proportionately reduced by the number of Common Units so issued (so that the equity dilution resulting from the issuance of the additional Common Units is borne by all of the Members of the Company on a proportionate basis). It is currently estimated that the number of Common Units available for other key employees will be sufficient for a staff of up to 25 employees.

(c) Upon each issuance of any additional Common Units, the person acquiring the Common Units shall execute an agreement, in form and substance satisfactory to the Board of Managers, confirming the admission of the person as a member of the Company and the person's agreement to be bound by the terms of this Agreement and setting forth the number of Common Units issued to the person and such other terms, not inconsistent with the terms of this Agreement, as the Board of Managers may determine appropriate. No consent or approval of any other Member of the Company shall be required in connection with the admission of any such person as a member and the issuance of the Common Units to that person.

3.2 *INITIAL CAPITAL CONTRIBUTIONS.*

The Members holding Founder Common Units have not made any capital contribution with respect to the Founder Common Units and have not had any amount credited to their Capital Accounts with respect to their acquisition of the Founder Common Units. The investors who purchased Investor Common Units have contributed $1,000,000 in the aggregate for the 100,000 Investor Common Units issued to them. The aggregate amount credited to the Capital Account of each holder of Investor Common Units by reason of such capital contributions is shown in the register maintained pursuant to Section 10.11.

3.3 *ADDITIONAL CAPITAL.*

The Company may from time to time require additional capital to develop and carry on its business. The Board of Managers may determine the terms upon which any such capital contributions are made and the terms upon which additional Members are admitted to the Company. This Agreement shall be amended by the Board of Managers to reflect the issuance of any additional Common Units in connection with any such financing and to reflect the terms upon which such additional Common Units were issued. No consent or approval of any other Member shall be required in connection with the admission of such additional Members or the issuance of additional Common Units pursuant to this provision.

3.4 ***NO WITHDRAWALS.***

No Member shall be entitled to withdraw any part of such Member's Capital Account or capital contribution or to receive any distribution from the Company except as expressly provided in this Agreement or as may be determined by the Board of Managers in its sole discretion.

3.5 ***NO LIABILITY FOR CAPITAL CONTRIBUTIONS.***

No Member, including a member of the Board of Managers, shall be personally liable for the return of any portion of the capital contribution of any of the Members; any return of those capital contributions shall be made solely from the Company's assets. No Member, including a member of the Board of Managers, shall be required to pay to the Company or any other Member any deficit in any Member's Capital Account (upon dissolution or otherwise). No Member shall have the right to demand or receive cash or other property for that Member's interest in the Company.

3.6 ***NO INTEREST.***

No Member shall receive any interest on such member's capital contributions or Capital Account.

3.7 ***LIMITATIONS ON RIGHTS OF EMPLOYEE MEMBERS.***

None of the Members who is an employee of the Company shall have any right to be retained in the employ of the Company (except as may be provided in any separate employment agreement between the Company and that Member) and nothing in this Agreement shall limit in any way the right to terminate any Member's employment at any time with or without cause. In addition, nothing in this Agreement or otherwise shall (a) limit the Board of Managers' right to manage the business and affairs of the Company and to determine in its sole discretion the terms of any transaction between the Company and any third party or (b) give any Member any claim against the Company with respect to any good faith decision of the Board of Managers relating to the business or affairs of the Company or with respect to any such transaction with a third party (whether or not that decision diluted that Member's interest in the Company or affected any distribution to which the Member would be entitled under this Agreement).

4.0 ***DISTRIBUTIONS TO MEMBERS AND WITHHOLDING.***

4.1 ***DISTRIBUTIONS TO MEMBERS.***

(a) Except as otherwise provided in Section 9.2, distributions of Available Cash, securities or other property shall be made in such amount or amounts and at such time or times as may be determined by the Board of Managers to the Members in proportion to the number of Common Units held by them.

(b) Notwithstanding Section 4.1(a) above, no distribution will be made to the Founders pursuant to this Section 4.1 if, assuming the current distributions pursuant to Section 4.1(a) already have been made, the Net Asset Value (defined below) of the Company, calculated after giving effect to such distributions, is less than 110% of the aggregate Unrecovered Contribution Accounts of the Members. Any distribution which is not permitted to be made to the Founders pursuant to the immediately preceding sentence shall be held by the Company as a Reserve. If at any time and from time to time the Net Asset Value of the Company (taking into account the Reserve) exceeds 110% of the aggregate Unrecovered Contribution Accounts of the Members, the Board of Managers may cause the Company to release from the Reserve an amount equal to such excess, which shall be distributed to the Founders pursuant to Section 4.1(a).

(c) For purposes of Section 4.1(b) above, "Net Asset Value" means (i) the fair market value of the Company's assets, including accrued receivables and other assets, as determined by the Board of Managers in accordance with the Company's valuation policies and accounting practices, minus (ii) the then unpaid balance of any indebtedness of the Company, and minus (iii) the amount of any other accrued and unpaid liabilities and expenses of the Company.

For purposes of this Agreement, "Reserve" means funds held by the Company in the form of cash, cash equivalents and short-term investments not used to make current investments or pay expenses.

4.2 WITHHOLDING.

(a) Each Member shall, to the fullest extent permitted by applicable law, indemnify and hold harmless each person who is or who is deemed to be the responsible withholding agent for federal, state or local income tax purposes against all claims, liabilities and expenses of whatever nature (other than any claims, liabilities and expenses in the nature of penalties and accrued interest thereon that result from such person's fraud, willful misfeasance, bad faith or gross negligence) relating to such person's obligation to withhold and to pay over, or otherwise pay, any withholding or other taxes payable by the Company as a result of that Member's participation in the Company.

(b) Notwithstanding any other provision of this Agreement, (i) each Member hereby authorizes the Company to withhold and to pay over, or otherwise pay, any withholding or other taxes payable by the Company with respect to such Member or as a result of such Member's participation in the Company and (ii) if and to the extent that the Company shall be required to withhold or pay any such taxes (including any amounts withheld from amounts payable to the Company to the extent attributable, in the judgment of the Board of Managers, to the interest of such Member in the Company), such Member shall be deemed for all purposes of this Agreement to have received a payment from the Company as of the time such withholding or tax is required to be paid, which payment shall be deemed to be a distribution with respect to such Member's interest in the Company to the extent that the Member (or any successor to such Member's interest in the Company) is then entitled to receive a distribution. To the extent that the aggregate of such payments to a Member for any period exceeds the distributions to which such Member is entitled for such period, such Member shall make a prompt payment to the Company of such amount.

(c) If the Company makes a distribution in kind and such distribution is subject to withholding or other taxes payable by the Company on behalf of any Member, such Member shall make a prompt payment to the Company of the amount required to be withheld.

4.3 TAX LIABILITY DISTRIBUTIONS.

The Board of Managers shall, to the extent of Available Cash (as defined below), distribute to the Members amounts intended to cover the combined federal, state and local tax obligations of such Members as a result of the allocation to them of Net Profits and other items of Company income and gain in any fiscal year or other accounting period ("Tax Liability Distributions"). For the purposes of the foregoing, the combined federal, state and local income tax rate applicable to any Member shall be as determined in the sole discretion of the Board of Managers, and each Member's allocable share of such Net Profits and other items of Company income and gain in such fiscal year or other accounting period shall be net of the Member's aggregate cumulative Net Losses and other items of Company deductions and losses previously allocated to the Member and not yet offset against Net Profits and other items of Company income and gain. Tax Liability Distributions made to each Member shall be treated as advances of, and shall as soon as possible be recouped from, subsequent distributions otherwise to be received by the Member under Section 4.1, provided that in no event shall the Member otherwise be required to recontribute or otherwise return or repay any Tax Liability Distribution. "Available Cash" means the gross cash proceeds from Company operations (including from sales, financings and refinancings of Company property and collections from notes receivables) less the portion thereof used or to be used to pay or provide for the payment of Company expenses, debts (including debts to one or more of the Members), capital improvements, replacements and contingencies, all as determined in accordance with the terms of this Agreement. Notwithstanding the foregoing, it is understood that the Board of Managers will, from time to time, establish Reserves to provide for reasonable anticipated capital improvements and contingencies and for the purpose described in Section 4.1(b) above, and all such Reserves shall be in such amounts as the Board of Managers shall determine in its sole discretion.

5.0 *TRANSFERS OF INTERESTS.*

5.1 *RESTRICTIONS ON TRANSFERS.*

(a) Except with the written consent of the Board of Managers, which consent may be withheld by the Board of Managers in their sole discretion, or as provided in Section 5.3, no Member may sell, dispose of or encumber ("Transfer") all or any portion of such Member's interest in the Company, or enter into any agreement as a result of which any other person or entity shall have an interest in, or right to receive distributions from, the Company, and any attempted transfer or any such agreement shall be void.

(b) Before effecting any transfer of Common Units under Section 5.1(a) above, the Member desiring to Transfer the Common Units will provide the Company with a right of first offer to purchase the Common Units which the Member intends to sell. The Member desiring to transfer Common Units will provide the Company with written notice of such Member's proposed Transfer (the "Offer Notice") which Offer Notice shall contain the material terms and conditions of the Member's proposed Transfer to a third party. The Company may, at its option, elect to make an offer to purchase all (but not less than all) of the Common Units to be sold by the Member at those same terms by providing written notice to the Member within thirty (30) days of the Company's receipt of the Offer Notice. If the Company fails to make an offer to purchase the Common Units, the Member shall be permitted to Transfer the Common Units on whatever terms the Member deems appropriate within ninety (90) days after the date of the Offer Notice. If the Company delivers the Company Offer, the Member shall be permitted to transfer the Units to a third party within ninety (90) days after the date of the Offer Notice, provided that the terms and conditions are no more favorable to the third party purchaser then the terms and conditions contained in the Offer Notice.

5.2 *CONDITIONS TO TRANSFER.*

No transfer of an interest in the Company shall be effective unless the transferee (a) agrees in writing to be bound by the terms of this Agreement as if the transferee were the transferring Member and (b) executes such other documents and agreements as the Board of Managers reasonably may request. The Board of Managers may require as a condition to approving any Transfer that the Member desiring to Transfer Common Units provide to the Company an opinion of counsel reasonably satisfactory to the Board of Managers that registration of the Common Units is not required under the Securities Act of 1933, as amended, or any applicable state securities laws. The transferee shall pay all reasonable expenses in connection with the transferee's admission as a Member.

5.3 *DRAG ALONG.*

If at any time the holders of 50% or more of the Common Units shall propose to sell their interests in the Company to an unrelated third party that wants to purchase all of the interests in the Company, all of the other Members also shall sell their interests in the Company to the third party. The aggregate net proceeds of the sales of all of the interests shall be allocated among the Members in proportion to the amounts each Member would receive if the Company sold all of its assets for their respective fair market values and liquidited, distributing the proceeds in accordance with Section 9.2. The holders proposing to sell their Common Units shall give notice (specifying the identity of the prospective purchaser, the proposed purchase price, the date of the closing, and all other relevant information) to all of the other Members at least 60 days prior to the closing of the sale and the sale by all of the Members shall take place simultaneously.

5.4 *CERTIFICATES.*

Membership interests in the Company shall be evidenced by certificates or other such document as deemed appropriate by the Board of Managers.

6.0 *EXCULPATION; INDEMNIFICATION; CONTRIBUTION.*

6.1 ***EXCULPATION.***

To the extent not inconsistent with applicable law, neither any member of the Board of Managers nor any Member, nor any of their respective officers, directors, employees or affiliates, nor any officer of the Company, shall be liable, responsible or accountable in damages or otherwise to the Company or to any Member for any action taken or for any failure to act on behalf of the Company after the date hereof in connection with the business or operations of the Company, unless the act or omission was performed or omitted fraudulently or in bad faith.

6.2 ***INDEMNIFICATION.***

To the extent not inconsistent with applicable law, the Company shall indemnify and hold harmless the Members of the Board of Managers and the Members and all of their respective officers, directors, employees and affiliates, and all of the Company's officers, from any loss, liability, damage or expense (including, but not limited to, any judgment award or settlement and reasonable attorneys' fees and other costs or expenses incurred in connection with the defense of any actual or threatened action, proceeding or claim) arising out of (a) any acts or omissions or alleged acts or omissions in connection with their activities or the activities of any of their respective employees or agents on behalf of the Company after the original date hereof or in connections with the business or operations of the Company after the original date hereof, and (b) any liability imposed upon any of them under any statute, rule or regulation (including, but not limited to, any statute, rule or regulation relating to environmental matters) applicable to the Company or the Members of the Board of Managers or its officers or employees; provided that the acts or omissions or the alleged acts or omissions upon which the action or threatened action, proceeding or claim is based were not performed or omitted fraudulently or in bad faith by the indemnified party. Reasonable expenses incurred by any such indemnified party in connection with the matters referred to above may be paid or reimbursed by the Company in advance of the final disposition of the proceeding upon receipt by the Company of (i) a written affirmation by the indemnified party of such party's good faith belief that such party met the standard of conduct necessary for indemnification by the Company, and (ii) a written undertaking by or on behalf of the indemnified party to repay such amount if it shall ultimately be determined by a court of competent jurisdiction that such party has not met that standard of conduct.

7.0 ***OTHER ACTION.***

Each Member shall execute and deliver such additional documents and instruments, and shall perform such additional acts, as may be necessary or appropriate to carry out the terms of this Agreement. Each member hereby appoints the Board of Managers as such member's attorney-in-fact to execute and deliver such additional documents and instruments and to take such additional action on such Member's behalf as may be necessary or appropriate to carry out the terms of this Agreement.

8.0 ***DURATION OF COMPANY.***

The Company shall continue in existence until the earlier of (a) thirty years from the date of formation and (b) the date the Company is dissolved in accordance with Section 9.0.

9.0 ***DISSOLUTION; LIQUIDATION.***

9.1 ***DISSOLUTION.***

The Company shall be dissolved prior to the expiration of thirty years from the date of formation only upon the occurrence of one of the following events:

(a) the election by Members who then own in the aggregate 66 2/3% or more of the Common Units to dissolve the Company; or

(b) the termination of the Company's business as a result of the sale by the Company of substantially all of its business and assets.

9.2 ***LIQUIDATION AND DISTRIBUTION OF ASSETS.***

Upon dissolution of the Company, the Board of Managers shall proceed to sell or liquidate the assets of the Company (to the extent feasible) within a reasonable time and, after paying or making provision for a liabilities to creditors of the Company, shall distribute the Company's cash and other assets among the Members in the following order and priority:

(i) First, to the Members, in proportion to and to the extent of the Unrecovered Contribution Accounts of the Members as of the date of liquidation; and then

(ii) Thereafter, to the Members in proportion to the balances, if any, in their respective Capital Accounts.

For purposes of this Agreement, "Unrecovered Contribution Account" means, for each Member, as of any relevant date, the amount, if any, by which the aggregate amount of cash and/or the agreed upon fair market value of any property contributed by such Member as a capital contribution pursuant to Sections 3.2 and 3.3 hereof (net of liabilities secured by such contributed property the Company is considered to assume or take subject to pursuant to Section 752 of the Code), exceeds the aggregate amounts distributed by the Company to such Member pursuant to Section 9.2(i) hereof. The register maintained pursuant to Section 10.11 sets forth the Unrecovered Contribution Account of each Member as of the date of the amendment and restatement of this Agreement.

10.0 ***ACCOUNTING AND TAX MATTERS.***

10.1 ***FISCAL YEAR***

The Company's fiscal year shall end on December 31 of each year unless changed by the Board of Managers. The Company's tax year shall be as required by the Internal Revenue Code of 1986, as amended (the "Code") and the applicable Treasury Regulations promulgated under the Code, as amended from time to time (the "Treasury Regulations").

10.2 ***BOOKS OF ACCOUNT ETC.***

Complete and accurate books of account shall be kept by the Company at its principal office (or other office as the Board of Managers may designate) and the Members shall have the right to inspect the books during normal business hours on reasonable notice to the Board of Managers. The Company's books of account shall be kept on the cash or accrual basis of accounting, as the Board of Managers may determine in accordance with sound accounting practices and principles applied in a consistent manner by the Company; all methods of accounting and treatment of particular transactions reflected on the books shall be in accordance with the methods of accounting employed for federal income tax purposes. The determinations of the Board of Managers with respect to the treatment of any item or its allocation for federal, state or local income tax purposes shall be binding upon all Members so long as that determination is not inconsistent with any express provision of this Agreement.

10.3 ***REPORTS.***

The Company shall furnish to each Member, within 45 days after the end of each quarter, year-to-date statements of income and a balance sheet as of the end of that quarter. The Company shall furnish to each Member within 90 days after the end of each fiscal year (except for the year ending December 31, 1999), audited financial statements of the Company with respect to that year. The financial statements shall include a balance sheet of the Company as of the end of the fiscal year and a statement of income and Capital Accounts and a statement of changes in financial position of the Company for the year.

10.4 *TAX INFORMATION.*

Not later than 30 days after the date of delivery of the annual financial statements to Section 10.3, the Board of Managers shall furnish to each Member any information required by that Member to complete any income tax return that such member is required to file for that year. The Company shall also furnish tax information to the Members on an interim basis to the extent the Board of Managers determines appropriate.

10.5 *TAX ALLOCATIONS.*

Except as provided in Section 10.7, for federal, state and local income tax purposes, all items of income deduction gain and loss shall be allocated among the Members on the same basis as Net Profits, Net Losses and other items of income, gain, deductions and losses are allocated as provided in this Section 10 and all items of credit shall be allocated among the Members in the manner provided for in the Code and the applicable Treasury Regulations.

10.6 *CAPITAL ACCOUNTS.*

For the purpose of this Agreement, the balance of the Capital Account ("Capital Account") of each Member shall be determined on the basis of an account maintained for that Member as part of the books of account of the Company. The amount of each Member's Capital Account shall be equal to the aggregate amount of cash or property contributed to the Company by that Member (less any liabilities assumed with respect to such contribution), and shall be increased by the Net Profits and other items of income and gains of the Company allocated to such Member, and shall be decreased by (a) the aggregate amount of cash and the fair market value of any property distributed by the Company (less any liabilities assumed with respect to such distribution) to that Member and (b) the Net Losses and other items of deduction and losses of the Company allocated to such Member (whether incurred prior to or after the date hereof). If all or a portion of a Member's interest in the Company is transferred in accordance with the provisions of this Agreement, the transferee shall succeed to the Capital Account of the transferor to the extent of the interest so transferred.

10.7 *NET PROFIT AND NET LOSSES.*

(a) After making any special allocations under Section 10.7(c) hereof, Net Profits for the current fiscal year shall be allocated in the following order and priority:

(i) First, to the Members, in proportion to and to the extent of the cumulative allocations of Net Losses allocated to the Members under Section 10.7(b)(iii) for all prior fiscal years;

(ii) Second, to the Members, in proportion to and to the extent of the cumulative allocations of Net Losses allocated to the Members under Section 10.7(b)(ii) for all prior fiscal years; and then

(iii) Thereafter, to the Members in proportion to the number of Common Units held by them.

(b) After making any special allocations under Section 10.7(c) hereof, Net Losses for the current fiscal year shall be allocated in the following order and priority:

(i) First, to the Members, in proportion to and to the extent the excess, if any, of (A) the cumulative allocations of Net Profits to each Member under Section 10.7(a)(iii) hereof for all prior fiscal years, over (B) the cumulative distributions (and deemed distributions) to such Member under Sections 4.1, 4.2 and 4.3 hereof for the current and all prior fiscal years;

(ii) Second, to the Members in proporation to their respective Unrecovered Contribution Accounts, until the cumulative allocations of Net Losses to each Member under this Section 10.7(b)(ii) for the current and all prior fiscal years (net of the cumulative allocations of Net Profits to such Member under Section

10.7(a)(ii) for all prior fiscal years) are equal to the Unrecovered Contribution Account of such Member as of the end of the current fiscal year; and then

(iii) Thereafter, to the Members in proportion to the number of Common Units held by them.

(c) Before any allocations are made pursuant to Section 10.7(a) or Section 10.7(b), the following special allocations shall be made in the following order:

(i) If there is a net decrease in "partnership minimum gain," as defined in Treasury Regulations Section 1.704-2(b)(2) and 1.704-2(d)(1) for any Company taxable year (except as a result of certain conversions or refinancings of Company indebtedness, certain capital contributions, or certain revaluations of property as further outlined in Treasury Regulation Sections 1.704-2(d)(4), (f)(2) or (f)(3)) each Member shall be specially allocated items of Company income and gain for such year (and, if necessary, subsequent years) in an amount equal to that Member's share of the net decrease in partnership minimum gain. The items to be so allocated shall be determined in accordance with Treasury Regulation Section 1.704-2(f). This paragraph (i) is intended to comply with the minimum gain chargeback requirement in said section of the Treasury Regulations and shall be interpreted consistently therewith. Allocations pursuant to this paragraph (i) shall be made in proportion to the respective amounts required to be allocated to each Member pursuant hereto.

(ii) If there is a net decrease in "partner minimum gain," as defined in Treasury Regulations Section 1.704-2(i), during any taxable year (other than due to the conversion, refinancing or other change in the debt instrument causing it to become partially or wholly nonrecourse, certain capital contributions, or certain revaluations of property as further outlined in Regulation Section 1.704-2(i)(4)), each Member shall be specially allocated items of Company income and gain for such year (and, if necessary, subsequent years) in an amount equal to that Member's share of the net decrease in the partner minimum gain. The items to be so allocated shall be determined in accordance with Regulation Sections 1.704-2(i)(4) and (j)(2). This paragraph (ii) is intended to comply with the minimum gain chargeback requirement with respect to partner nonrecourse debt contained in said sections of the Regulations and shall be interpreted consistently therewith. Allocations pursuant to this paragraph (ii) shall be made in proportion to the respective amounts required to be allocated to each Member pursuant hereto.

(iii) If any Member unexpectedly receives any adjustment, allocation or distribution described in Sections 1.704-1(b)(2)(ii)(d)(4), 1.704-1(b)(2)(ii)(d)(5) or 1.704-1(b)(2)(ii)(d)(6) of the Treasury Regulations which causes such member to have an, or increases the amount of its, Adjusted Capital Account Deficit (as defined below), items of Company income and gain shall be specially allocated to such Member in an amount and manner sufficient to eliminate, to the extent required by the Treasury Regulations, such Member's Adjusted Capital Account Deficit as quickly as possible, provided that an allocation pursuant to this Section 10.7(c)(i) shall be make to a Member only if and to the extent that such member would have an Adjusted Capital Account Deficit after all other allocations provided for in this Section 10.7 have been tentatively make as if this Section 10.7(c)(i) were not in this Agreement. This Section 10.7(c)(i) is intended to constitute a "qualified income offset" as defined in Section 1.704-1(b)(2)(ii)(d) of the Treasury Regulations. "Adjusted Capital Account Deficit" means, with respect to any Member, the deficit balance, if any, in such Member's Capital Account as of the end of the relevant fiscal year or other accounting period determined after (i) crediting to such Capital Account any amounts which such Member is obligated to restore thereto hereunder or is deemed to be obligated to restore thereto pursuant to the penultimate sentences of Sections 1.704-2(g)(1) and 1.704-2(h)(5) of the Treasury Regulations and (ii) debiting to such Capital Account the items described in 1.704-1(b)(2)(ii)(d)(4), 1.704-1(b)(2)(ii)(d)(5) or 1.704-1(b)(2)(ii)(d)(6) of the Treasury Regulations. The foregoing definition of Adjusted Capital Account Deficit is intended to comply with the provisions of Section 1.704-1(b)(2)(ii)(d) of the Treasury Regulations and shall be interpreted consistently therewith.

(iv) If any Member has a deficit Capital Account balance as of the end of any fiscal year or other accounting period of the Company that is in excess of the amount such Member is obligated to restore to such Member's Capital Account hereunder or is deemed to be obligated to restore to such Member's Capital Account pursuant to the penultimate sentences of Sections 1.704-2(g)(1) and 1.704-2(h)(5) of the Treasury Regulations, items of Company income and gain in the amount of such excess shall be specially allocated to such Member as quickly as possible, provided that an allocation pursuant to this Section 10.7(c)(ii) shall be made to a Member only if an to the extent that

such Member would have a deficit Capital Account balance that is in excess of the amount such Member is obligated to restore to his or her Capital Account hereunder or is deemed to be obligated to restore to such Member's Capital Account to restore to his or her Capital Account hereunder or is deemed to be obligated to restore to such Member's Capital Account pursuant to the penultimate sentences of Sections 1.704-2(g)(1) and 1.704-2(h)(5) of the Treasury Regulations after all other allocations provided for in this Section 10.7 have been tentatively made as if this Section 10.7(c)(iv) and Section 10.7(c)(iii) were not in this Agreement.

(v) To the extent an adjustment to the adjusted tax basis of any asset of the Company pursuant to Section 734(b) or Section 743(b) of the Code is required, pursuant to Section 1.704(b)(2)(iv)(m) of the Treasury Regulations, to be taken into account in determining Capital Accounts, the amount of such adjustment to the Capital Accounts shall be treated as an item of gain or loss and be specially allocated to the Members pursuant to Section 1.704-1(b)(2)(iv)(m) of the Treasury Regulations.

(vi) Notwithstanding Section 10.7(b), a Net Loss allocation shall not be made to a Member to the extent that such allocation would cause such member to have an Adjusted Capital Account Deficit. A Net Loss allocation that would be make to a member but for this Section 10.7(c)(vi) shall instead be made to the other Members to the extent of and in proportion to the amounts of such Loss that they could then be allocated without such other Members having Adjusted Capital Account Deficits (or, if such other Members would not have Adjusted Capital Account Deficits, in proportion to the number of their respective Common Units) and thereafter to all of the Members in proportion to the number of their respective Common Units.

(vii) If the Company is deemed to have incurred any borrowings, the Company (a) shall allocate "nonrecourse deductions," computed and determined in accordance with Section 1.704-2(b)(1), 1.704-2(c) and 1.704-2(j) of the Treasury Regulations, it may have to the Members in proportion to the number of their respective Common Units, and (b) shall allocate any "partner nonrecourse deductions," computed and determined in accordance with Sections 1.704-2(i) and 1.704-2(j) of the Treasury Regulations, it may have to the Member that bears the economic risk of loss for the debt in respect of which the "partner nonrecourse deductions" are attributable (as determined under Section 1.704-2(b)(4) and (i)(1) of the Treasury Regulations.

(viii) The allocations set forth in Section 10.7(c)(i) through (vii) (the "Regulatory Allocations") are intended to comply with certain requirements of the Treasury Regulations. It is the intent of the Members that, to the extent possible, all Regulatory Allocations that are made be offset either with other Regulatory Allocations or with special allocations pursuant to this Section 10.7(c)(viii). Therefore, notwithstanding any other provision of this Section 10.7 (other than the Regulatory Allocations), the Board of Managers shall make such offsetting special allocations in whatever manner it determines appropriate so that, after such offsetting allocations are made, each Member's Capital Account balance is, to the extent possible, equal to the Capital Account balance such Member would have had if the Regulatory Allocations were not part of the Agreement and all Company items were allocated pursuant to Sections 10.7(a) and (b).

(d) Notwithstanding anything to the contrary in this Section 10.7, for federal income tax purposes, income, gains, losses and deductions with respect to property contributed to the Company by a Member shall be allocated among the Members so as to take account of the variations between the tax basis of the property to the Company and its fair market value at the time of contribution, under the "traditional method" provided for in Treasury Regulations Section 1.704-3(b).

(e) For purposes of this Agreement, "Net Profits" and "Net Losses" for each fiscal year or other period, means an amount equal to the Company's taxable income or loss for such year or period, determined in accordance with Code Section 703(a) (for this purpose, all items of income, gain, loss, or deduction required to be stated separately pursuant to Code Section 703(a)(1) shall be included in taxable income or loss), with the following adjustments:

(i) Any income of the Company that is exempt from federal income tax and not otherwise taken into account in computing Net Profits or Net Losses pursuant to this definition shall be added to such taxable income or loss;

(ii) Any expenditures of the Company described in Code Section 705(a)(2)(B) or treated as Code Section 705(a)(2)(B) expenditures pursuant to Treasury Regulations Section 1.704-1(b)(2)(iv)(i), and not otherwise taken into account in computing Net Profits or Net Losses pursuant to this definition shall be subtracted from such taxable income or loss;

(iii) In the event the Gross Asset Value of any Company asset is adjusted pursuant to clause (ii) or clause (iii) of the definition of Gross Asset Value, the amount of such adjustment shall be taken into account as gain or loss from the disposition of such asset for purposes of computing Net Profits or Net Losses;

(iv) Gain or loss resulting from any disposition of property with respect to which gain or loss is recognized for federal income tax purposes shall be computed by reference to the Gross Asset Value of the property disposed of, notwithstanding that the adjusted tax basis of such property differs from its Gross Asset Value;

(v) Notwithstanding any other provision of this definition, any items which are specially allocated pursuant to Section 10.7(c) hereof shall be excluded from such taxable income or loss; and

(vi) In lieu of the depreciation, amortization and other cost recovery deductions taken into account in computing such taxable income or loss, there shall be taken into account depreciation computed in accordance with Section 1.704-1(b)(2)(iv)(g) of the Treasury Regulations for such fiscal year or period.

(f) For purposes of this Agreement, "Gross Asset Value" means, with respect to any asset, the asset's adjusted basis for federal income tax purposes, except as follows:

(i) The initial Gross Asset Value of any asset contributed by a Member to the Company shall be the gross fair market value of such asset, as determined by agreement between the contributing Member and all other Members;

(ii) The Gross Asset Values of all Company assets shall be adjusted to equal their respective gross fair values as of the following times: (a) the acquisition of an additional interest in the Company by any new or existing Members in exchange for more than a de minimis capital contribution if the Board of Managers reasonably determines that such adjustment is necessary or appropriate to reflect the relative economic interests of the Members in the Company; (b) the distribution by the Company to a Member of more than a de minimis amount of Company property as consideration for an interest in the Company if the Board of Managers reasonably determines that such adjustment is necessary or appropriate to reflect the relative economic interests of the Members in the Company; and (c) the liquidation of the Company within the meaning of Treasury Regulations Section 1.704-1(b)(2)(ii)(g);

(iii) The Gross Asset Value of any Company asset distributed to any Member shall be the gross fair value of such asset on the date of distribution; and

(iv) The Gross Asset Values of Company assets shall be increased (or decreased) to reflect any adjustments to the adjusted basis of such assets pursuant to Code Section 734(b) or Code Section 743(b), but only to the extent that such adjustments are taken into account in determining Capital Accounts pursuant to Treasury Regulations Section 1.704-1(b)(2)(iv) (m); provided, however, that Gross Asset Values shall not be adjusted pursuant to this clause (iv) to the extent that an adjustment pursuant to the foregoing clause (ii) is made in connection with a transaction that would otherwise result in an adjustment pursuant to this clause (iv).

10.8 *CHANGE OF MEMBERS' UNITS.*

If there is a change in the number of Units held by any Member during a fiscal year, the fiscal year shall be divided into two parts, the first beginning with the first day of the fiscal year (or the first day following an earlier change during that year) and ending with the date of the change and the second being the remainder of the year, and the Company's net income, gains and losses for the entire fiscal year shall be allocated to the separate parts in proportion to the number of days in each.

10.9 ***ELECTIONS.***

To the extent that the Company may make elections for federal, state or local income tax purposes, the elections shall be made in a manner best calculated, in the opinion of the Board of Managers, to minimize the cash requirements of the Company and the Members. No Member shall treat a Company item on its federal, state or local income tax returns in a manner inconsistent with the treatment of the item on the Company's federal, state or local income tax return.

10.10 ***TAX MATTERS PARTNER.***

A person to be named shall be the tax matters partner (within the meaning of Section 623 1(a)(7) of the Code) of the Company.

10.11 ***MEMBER LEDGER.***

The Company shall maintain at its principal executive office a register showing with respect to each Member as of the date of the amendment and restatement of this Agreement: (i) the Members' name and address, (ii) the number of Founder Common Units and Investor Common Units owned by the Member, (iii) the Capital Account of the Member, (iv) the Unrecovered Contribution Account of the Member, and (v) the initial capital contribution to the Company made by such Member. Such register shall be updated from time to time as necessary to reflect changes in the foregoing information.

11.0 ***MEMBER REPRESENTATIONS.***

Each Member hereby represents with respect to itself as follows:

11.1 ***INVESTMENT PURPOSE.***

Each Member represents and warrants that it has acquired its interest in the Company for its own account, for investment only, and not with a view to the sale or distribution of that interest or any portion of that interest. Each Member recognizes that an investment in the Company is speculative and involves certain risks.

11.2 ***AUTHORIZATION.***

The execution and delivery of this Agreement and the consummation of the transactions contemplated hereby have been duly authorized by such Member, and no other proceedings on the part of such Member are necessary to approve and authorize the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby in accordance with the terms hereof. This Agreement constitutes a valid and binding agreement of such Member, enforceable against such Member in accordance with its terms, except to the extent limited by (a) bankruptcy, insolvency, reorganization, fraudulent transfer, moratorium or similar laws now or hereafter in effect relating to creditors' rights generally, and (b) general principles of equity.

11.3 ***COMPLIANCE WITH LAWS AND OTHER INSTRUMENTS.***

The execution and delivery of this Agreement, the consummation of the transactions contemplated hereby and the performance of such Member's obligations hereunder will not conflict with, or result in any violation of or default under, any provision of any charter, by-laws, or other governing instrument applicable to such Member, or any agreement or other instrument to which such Member is a party or by which such Member or any of its properties are bound, or any permit, franchise, judgment, decree, statute, order, rule or regulation applicable to such Member or its business or properties.

12.0 ***NON-COMPETITION, ETC.***

NON-DISCLOSURE.

None of the Members may at any time after the date of this Agreement disclose to anyone (except in connection with the performance of services for the Company or otherwise on behalf of the Company) or use in competition with the Company, any confidential information or trade secrets with respect to the business of the Company

12.2 NON-SOLICITATION.

None of the Members may, so long as he, she or it is a Member and for a period of one year thereafter, directly or indirectly solicit for employment or hire any person who during the twelve month period preceding the date of solicitation or hiring was an employee of the Company.

12.3 NON-COMPETITION.

None of the Members who is an employee of the Company may, so long as such Member is an employee of the Company and, unless such Member's employment is terminated without Cause or for Good Reason, for a period of 18 months after termination of employment, except through the Company, directly or indirectly, engage or be interested in the business of developing new technologies that are in direct competition with the Company's technologies. The term "Cause" for purposes of this Agreement means the employee: (i) engages in misconduct which is injurious to the Company, monetarily or otherwise; (ii) fails to satisfactorily perform the employee's assigned duties; (iii) is convicted of, or pleads guilty or *nolo contendere* (or its equivalent) to, a felony; or (iv) violates any provision of, or engages in prohibited activity which is set forth in, an agreement between the employee and the Company or in a policy adopted by the Company. The term "Good Reason" for purposes of this Agreement means: (i) the Company's failure to comply in any material respect with the terms of any employment agreement with the employee, which failure is not corrected by the Company within thirty days after receiving written notice of such failure from the employee, (ii) the relocation of the employee's place of employment, without Executive's prior written consent, to any of the Company's offices other than those located in, or within 50 miles of any Company office or lab, if the employee resigns within forty-five days of such relocation, or (iii) a material, non-consensual reduction of the employee's duties and responsibilities if the employee resigns within forty-five days of such reduction.

12.4 ENFORCEMENT.

Each of the Members acknowledges that the remedy at law for breach of the provisions of this Section 12 will be inadequate and that in addition to any other remedy the Company may have, it will be entitled to an injunction restraining any such breach or threatened breach, without any bond or other security being required and without the necessity of showing actual damages or economic loss.

13.0 MISCELLANEOUS.

13.1 ENTIRE AGREEMENT; AMENDMENT.

This Agreement contains a complete statement of the arrangements among the Members with respect to the Company, supersedes all prior agreements and understandings among them with respect to the Company, and may not be amended, except as provided herein, unless approved in writing by Members who then own in the aggregate 66 2/3 or more of the Common Units; provided, however, that the Board of Managers may admit additional Members and may amend this Agreement without further notice to or consent of any Member to the extent necessary to reflect the issuance of additional Common Units to existing Members or new Members pursuant to Sections 3.1 and 3.3. Except as otherwise provided in the preceding sentence, no amendment may change the manner in which cash is to be distributed or income is to be allocated, except with the consent of all of the Members, and no amendment that adversely affects a particular Member or Members (as distinguished from an amendment that affects all of the Members similarly), may be made without that Member's consent. No amendment may be made to this Section 13.1

that eliminates the necessity of obtaining any Member's consent to any amendment without the prior consent of that Member. Any amendment made in accordance with this Section 13.1 shall be binding upon all of the Members.

13.2 EXPENSES.

All legal fees and other expenses relating to the organization of the Company and to the preparation of this Agreement and the employment agreements referred to in this Agreement shall be paid by the Company.

13.3 NOTICES.

Any notice or other communication under this Agreement shall be in writing and shall be considered given when delivered in person or sent by facsimile, one day after being sent by a major overnight courier, or four days after being mailed by registered mail, return receipt requested, to the parties at their last known addresses as provided to the Company by them.

13.4 GOVERNING LAW.

This Agreement shall be governed by and construed in accordance with the law of the State of Florida applicable to agreements made and to be performed in Florida.

13.5 DEFINITION OF AFFILIATE.

As used in this Agreement, the term "affiliate" means any person or entity directly or indirectly controlled by, controlling, or under common control with, any other person or entity.

13.6 SEVERABILITY.

If any provision of this Agreement is invalid or unenforceable, the balance of this Agreement shall remain in effect and shall be enforceable to the maximum extent permitted by law, and if any provision is inapplicable to any person or circumstance, it shall nevertheless remain applicable to all other persons and circumstances.

13.7 HEADINGS.

The headings in this Agreement are solely for the convenience of reference and shall not affect its interpretation.

13.8 MULTIPLE COUNTERPARTS

This Agreement may be excuted in two or more counterparts, each of which shall be deemed an original, but all of which shall constitute on and the same instrument.

14.0 CONVERSION AND REGISTRATION RIGHTS.

14.1 CONVERSION.

Each of the Members hereby agrees that upon request of the Board of Managers, it will, at the expense of the Company, take such action and execute such documents as may reasonably be necessary to convert the Company in a corporation. In such event, Members shall be entitled to receive upon such conversion that percentage of the securities of the corporation into which the Company is converted as equals the percentage of the Common Units which such Members held in the Company immediately prior to such conversion; provided that, (a) the Company shall have complied with all of the provisions of this Agreement, including, without limitation, those relating to proportional adjustments and anti-dilution protection with respect to the Common Units, and (b) upon completion of such conversion the securities received by each such Member shall be on parity.

14.2 ***REGISTRATION RIGHTS.***

(a) Definitions.

As used in this Section 14.2, the following terms shall have the following respective meanings:

"Common Stock" means common stock issued by any corporation into which the Company shall be converted.

"Commission" means the Securities and Exchange Commission, or any other Federal agency at the time administering the Securities Act.

"Corporation" means any corporation which is a successor entity of the Company.

"Exchange Act" means the Securities Exchange Act of 1934, as amended, or any similar federal statute, and the rules and regulations of the Commission issued under such Act, as they each may, from time to time, be in effect.

"Registration Statement" means a registration statement filed by the Corporation with the Commission for a public offering and sale of Common Stock (other than a registration statement covering only securities proposed to be issued in exchange for securities or assets of another corporation).

"Registration Expenses" means the expenses described in Section 14.2(d).

"Registrable Shares" means (i) any shares of Common Stock hereafter acquired by the Stockholders and any shares of Common Stock issued in respect of such shares because of stock splits, stock dividends, reclassification, recapitalizations, or similar events); provided, however, that shares of Common Stock which are Registrable Shares shall cease to be Registrable Shares upon any sale pursuant to a Registration Statement or Rule 144 under the Securities Act.

"Securities Act" means the Securities Act of 1933, as amended, or any similar federal statute, and the rules and regulations of the Commission issued under such Act, as they each may, from time to time, be in effect.

"Stockholder" means a Member which has become a stockholder of the Corporation as contemplated by Section 14.1.

(b) Piggyback Registration.

If, at any time, but not within 180 days following the Corporation's initial public offering, the Corporation determines to register any of its equity securities (excluding the registration of any equity security in combination with and a debt security of the Corporation , or any securities to be issued pursuant to any employee benefit plan, any stock option, stock purchase or similar plan or in connection with any corporate reorganization, merger, exchange offer or acquisition of a business) for its own account or for the account of others under the Securities Act in connection with the public offering of such securities, the Corporation shall, at each such time, promptly give each Stockholder written notice of such determination no later than twenty-five (25) business days before the effective date of any such registration. Upon the written request of any Stockholder received by the Corporation within fifteen (15) days after the giving of such notice by the Corporation, the Corporation shall use its best efforts to cause to be registered under the Securities Act all of the securities that are to be included by the Corporation (or other person (including any Stockholder) for whose account the registration is made) for its own account and at the request of Stockholders pursuant to this Section 14.2(b). If the securities to be included by the Corporation (or other person for whose account the registration is made) for its own account and the securities to be included at the request of Stockholders pursuant to this Section 14.2(b) exceeds the amount of securities that the underwriters reasonably believe compatible with the success of the offering, then the Corporation will include in such registration only the number of securities which in the opinion of such underwriters can be sold, in the following order:

(i) first, the equity securities of the Corporation (or other person at whose request the registration is made);

(ii) second, if the registration is not for the account of the Corporation, the equity securities of the Corporation; and

(iii) third, the Registrable Shares requested to be included by the Stockholders pro rata based on the number of Registrable Shares which each of them owns with the effect and result that all of the Stockholders shall be treated equally and ratably in connection with any registration pursuant to the Section 14.2(b); provided, however if an underwriter who is not an affiliate of any Stockholder or the Corporation, in good faith, requests for the success of the offering that the number of Registrable Shares to be sold by any of the Stockholders exercising piggyback rights pursuant to this Section 14.2(b) be apportioned or excluded, such number of Registrable Shares of such Stockholders shall be reduced or not included to the extent so requested by said underwriter.

(c) Registration on Form S-3.

The Corporation shall use its best efforts to qualify for registration on Form S-3 or any comparable or successor form; and to that end the Corporation shall register (whether or not required by law to do so) the Common Stock under the Exchange Act in accordance with the provisions of the Exchange Act following the effective date of the first registration of any securities of the Corporation on Form S-1 or any comparable or successor form. After the Corporation has qualified for the use of Form S-3, the Stockholders shall have the right to request an unlimited number of registrations on Form S-3 (such requests shall be in writing and shall state the number of shares of Registrable Shares to be disposed of and the intended methods of disposition of such shares with an aggregate market value of less than Ten Million Dollars ($10,000,000) and the Corporation shall not be required to register shares under this Section 14.2(c) more than twice in any twelve (12) month period.

(d) Obligations of the Corporation.

(i) Whenever required under Sections 14.2(b) or 14.2(c) hereof to use its best efforts to effect the registration of any Registrable Shares, the Corporation shall:

(A) Prepare and file with the Commission a Registration Statement with respect to such Registrable Shares and use its best efforts to cause such Registration Statement to become and remain effective, including, without limitation, filing of post effective amendments and supplements to any Registration Statement or prospectus necessary to keep the Registration Statement current;

(B) As expeditiously as reasonably possible, prepare and file with the Commission such amendments and supplements to such Registration Statement and the prospectus used in connections with such Registration Statement as may be necessary to comply with the provisions of the Securities Act with respect to the disposition of all securities covered by such Registration Statement and to keep each registration and qualification under this Agreement effective (and in compliance with the Securities Act) by such actions as may be necessary or appropriate for a period of up to one hundred eighty (180) days (if, in the reasonable discretion of the Stockholders owning securities covered by such Registration Statement, such period of time is necessary for the successful completion of the offering of such securities) after the effective date of such Registration Statement, all as requested by such Stockholders.

(C) As expeditiously as reasonably possible, furnish to the Stockholders such numbers of copies of a prospectus, including a preliminary prospectus, in conformity with the requirements of the Securities Act, and such other documents as they may reasonably request in order to facilitate the disposition of Registrable Shares owned by them;

(D) As expeditiously as reasonably possible, use its best efforts to register and qualify the securities covered by such Registration Statement under such securities or "blue sky" laws of such jurisdictions as shall be reasonably appropriate for the distribution of the securities covered by the Registration Statement, provided that the Corporation shall not be required in connection therewith or as a condition thereto to qualify to do business or to file a general consent to service of process in any such jurisdiction;

(E) Use its best efforts to cause all Registrable Shares covered by such Registration Statement to be registered with or approved by such other governmental agencies or authorities as may be necessary to enable the seller or sellers thereof to consummate the disposition of such Registrable Shares;

(F) Notify each seller of Registrable Shares covered by such Registration Statement, at any time when a prospectus relating thereto is required to be delivered under the Securities Act, upon discovery that, or upon the happening of any event as a result of which, the prospectus included in such Registration Statement, as then in effect, includes an untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading in the light of the circumstances under which they were made, and at the request of any such seller or Stockholder promptly prepare and furnish to such seller or Stockholder a reasonable number of copies of a supplement to or an amendment of such prospectus as may be necessary so that, as thereafter delivered to the purchasers of such securities, such prospectus shall not include an untrue statement of a material fact or omit to state a material fact required to be state therein or necessary to make the statements therein not misleading in the light of the circumstances under which they were made;

(G) Otherwise use its best efforts to comply with all applicable rules and regulations of the Commission, and make available to its security holders, as soon as reasonably practicable, an earnings statement covering the period of at least twelve months, but not more than eighteen months, beginning with the first full calendar month after the effective date of such Registration Statement, which earnings statement shall satisfy the provisions of Section 11(a) of the Securities Act, and will furnish to each such seller of Registrable Shares at least two (2) business days prior to the filing thereof a copy of any post-effective amendment or supplement to such Registration Statement or prospectus and shall not file any thereof to which any such seller shall have reasonably objected, except to the extent required by law, on the grounds that such amendment or supplement does not comply in all material respects with the requirements of the Securities Act or of the rules or regulations thereunder;

(H) Provide and cause to be maintained a transfer agent and register for all Registrable Shares covered by such Registration Statement from and after a date not later than the effective date of such Registration Statement; and

(I) Use its best efforts to list all Registrable Shares covered by such Registration Statement on any securities exchange on which any class of Registrable Shares is then listed.

(ii) The Corporation will furnish to each Stockholder on whose behalf Registrable Shares have been registered pursuant to this Agreement a signed counterpart, addressed to such stockholder, of an opinion of counsel for the Corporation dated the effective date of such Registration Statement, and such opinion of counsel shall cover those matters which are customarily covered in opinions of issuer's counsel delivered to underwriters in connection with underwritten public offerings of securities.

(iii) To the extent then permitted under applicable professional guidelines and standards, obtain a comfort letter from the Corporation's independent public accountants in customary form and covering such matters of the type customarily covered by comfort letters and an opinion form the Corporation's counsel in customary form and covering such matters of the type customarily covered in a public issuance of securities, in each case addressed to the Stockholder, and provide copies thereof to the Stockholders;

(iv) In connection with the preparation and filing of each Registration Statement registering Registrable Shares under this Agreement, the Corporation will give the Stockholders on whose behalf such Registrable Shares are to be so registered and their underwriters, if any, and their respective counsel and accountants, the opportunity to participate in the preparation of such Registration Statement, each prospectus included therein or filed with the Commission, and each amendment thereof of supplement thereto, and will give each of them such access to its books and records and such opportunities to discuss the business of the Corporation with its officers, its counsel and the independent public accountants who have certified its financial statements, as shall be necessary, in the opinion of such Stockholders or such underwriters or their respective counsel, in order to conduct a reasonable and diligent investigation with the meaning of the Securities Act.

(v) It shall be a condition precedent to the obligations of the Corporation to take any action pursuant to this Agreement that the Stockholders shall furnish to the Corporation such information regarding them, the Registrable Shares held by them, and the intended method of disposition of such securities as the Corporation shall reasonably request and as shall be required in connection with the action to be taken by the Corporation.

(vi) All expenses incurred in connection with a registration pursuant to Sections 14.2(b) hereof (excluding underwriters' discounts and commissions, which shall be borne by the sellers), including without limitation all registration and qualification fees, printers' and accounting fees, fees and disbursements of counsel for the Corporation and the reasonable fees and disbursements of one counsel for the selling Stockholders (which counsel shall be selected by a majority in interest of such Stockholders) shall be borne by the Corporation.

(vii) In connection with any registration of Registrable Shares under this Agreement, the Corporation will, if requested by the underwriters for any Registrable Shares included in such registration, enter into an underwriting agreement with such underwriters for such offering, such agreement to contain such representations and warranties by the Corporation, and such other terms and provisions as are customarily contained in underwriting agreements with respect to secondary distributions, including, without limitation, provisions relating to indemnification and contribution. The Stockholders on whose behalf Registrable Shares are to be distributed by such underwriters shall be parties to any such underwriting agreement, and the representations and warranties by, and the other agreements on the part of the Corporation to and for the benefit of such underwriters shall be also made to and for the benefit of such Stockholders. The Corporation shall use its reasonable best efforts to cause the underwriting agreement to comply with Section 14.2(d) to this Agreement.

(d) Indemnification.

In the event any Registrable Shares are included in a Registration Statement as provided in this Agreement:

(i) To the fullest extent permitted by law, the Corporation will indemnify and hold harmless each Stockholder requesting or joining in a registration, any underwriter (as defined in the Securities Act) for it, and each person, if any, who controls such Stockholder or such underwriter within the meaning or the Securities Act, from and against any losses, claims, damages, expenses (including reasonable attorneys' fees and expenses and reasonable costs of investigation) or liabilities, joint or several, to which they or any of them may become subject under the Securities Act or otherwise, insofar as such losses, claims, damages, expenses or liabilities (or actions or proceedings, whether commenced or threatened, in respect thereof) arise out of or are based on any untrue or alleged untrue statement of any material fact contained in such Registration Statement, including any preliminary prospectus or final prospectus contained therein or any amendments of supplements thereto, or arise out of or are based upon the omission or alleged omission to state therein a material fact required to be stated therein, or necessary to make the statements therein not misleading, or arise out of any alleged violation by the Corporation and relating to action or inaction required of the Corporation in connection with any such registration; provided, however, that the indemnity agreement contained in this Section 14.2 (h)(i) shall not apply to amounts paid in settlement of any such loss, claim, damage, liability or action to the extent that it arises out of or is based upon an untrue statement or omission made in connection with such Registration Statement, preliminary prospectus, final prospectus or amendment or supplement thereto in reliance upon and conformity with written information furnished expressly for use in connection with such registration by such Stockholder, underwriter or control person. Such indemnity shall remain in full force and effect regardless of any investigation made by or on behalf of such Stockholder, underwriter or control person and shall survive the transfer of such securities by such Stockholder.

(ii) To the fullest extent permitted by law, each Stockholder requesting or joining in a registration will indemnify and hold harmless the Corporation, each of its directors, each of its officers who has signed the Registration Statement, each person, if any, who controls the Corporation within the meaning of the Securities Act, and each agent and any underwriter for the Corporation and any person who controls any such agent or underwriter and each other Stockholder and any person who controls such Stockholder (within the meaning of the Securities Act) against any losses, claims, damages or liabilities to which the Corporation or any such director, officer, control person, agent, underwriter, or other Stockholder may become subject, under the Securities Act or otherwise, insofar as such losses, claims, damages or liabilities (or actions in respect thereto) arise out of or are based upon an untrue statement of any

material fact contained in such Registration Statement, including any preliminary prospectus or final prospectus contained therein or any amendments or supplements thereto, or arise out of or are based upon the omission to state therein a material fact required to be stated therein or necessary to make the statements therein not misleading, in each cases to the extent, but only to the extent, that such untrue statement or omission was made in such Registration Statement, preliminary or final prospectus, or amendment or supplement thereto, in reliance upon and in conformity with written information furnished by such Stockholder with respect to such Stockholder expressly for use in connection with such registration; and such Stockholder will reimburse any legal or other expenses reasonably incurred by the Corporation or any such director, officer, control person, agent, underwriter, or other Stockholder in connection with investigating or defending any such loss, claim, damage, liability or action; provided however, the indemnity obligation of each such Stockholder hereunder shall be limited to and shall not exceed the net proceeds actually received by such Stockholder upon a sale of Registrable Shares pursuant to a Registration Statement hereunder; and provided, further that the indemnity agreement contained in this Section 14.2(h)(ii) shall not apply to amounts paid in settlements effected without the consent of such Stockholder (which consent shall not be unreasonably withheld). Such indemnity shall remain in full force and effect regardless of any investigation made by or on behalf of the Corporation or any such director, officer, Stockholder, underwriter or control person and shall survive the transfer of such securities by such Stockholder.

(iii) Any person seeking indemnification under this Section 14.2(d) will (i) give prompt notice to the indemnifying party of any claim with respect to which it seeks indemnification (but the failure to give such notice sill not affect the right to indemnification hereunder, unless the indemnifying party is materially prejudiced by such failure) and (ii) unless in such indemnified party's reasonable judgment a conflict of interest may exist between such indemnified and indemnifying parties with respect to such claim, permit such indemnifying party, and other indemnifying parties similarly situated, jointly to assume the defense of such claim with counsel reasonably satisfactory to the parties. In the event that the indemnifying parties cannot mutually agree as to the selection of counsel, each indemnifying party may retain separate counsel to act on its behalf and at its expense. The indemnified party shall in all events be entitled to participate in such defense at its expense through its own counsel. If such defense is not assumed by the indemnifying party, the indemnifying party will not be subject to any liability for any settlement made without its consent (but such consent will not be unreasonably withheld). No indemnifying party will consent to entry of any judgment or enter into any settlement which does not include as unconditional term thereof the giving by the claimant or plaintiff to such indemnified party of a release from all liability in respect of such claim or litigation. An indemnifying party who is not entitled to, or elects not to, assume the defense of a claim will not be obligated to pay the fees and expenses of more than one counsel for all parties indemnified by such indemnifying party with respect to such claim, unless in the reasonable judgment of any indemnified party a conflict of interest may exist between such indemnified party and any other of such indemnified parties with respect to such claim, in which event the indemnifying party shall be obligated to pay the reasonable fees and expenses of such additional counsel.

(iv) If for any reason the foregoing indemnification is unavailable to any party or insufficient to hold it harmless as and to the extent contemplated by the preceding paragraphs of this Section 14.2(d), then each indemnifying party shall contribute to the amount paid or payable by the indemnified party as a result of such loss, claim, damage, expense or liability in such proportion as is appropriate to reflect the relative benefits received by the Corporation, on the one hand, and the applicable indemnified party, as the case may be, on the other hand, and also the relative fault of the Corporation and any applicable indemnified party, as the case may be, as well as any other relevant equitable considerations.

(e) Lock-Up Agreement.

If required by the underwriter, each Stockholder agrees not to sell or otherwise transfer or dispose of any Common Stock (or other securities) of the Corporation held by such Stockholder (other than securities included in the applicable Registration Statement, or shares purchased in the public market after the effective date of registration) or any interest or future interest therein during such period (not to exceed 180 days if such registration is the Corporation's initial public offering and not to exceed 90 days if such registration is other than the Corporation's initial public offering) as is acceptable to the underwriter following the effective date of each Registration Statement of the Corporation filed under the Securities Act which includes securities to be sold to the public in an underwritten

offering. The Corporation may impose stop transfer instructions with respect to the shares (or securities) subject to the foregoing restriction until the end of said period.

(f) No Inconsistent Agreements.

The Company agrees that it has not entered into, and it will not hereafter enter into, any agreement with respect to the registration of its securities that is inconsistent with (or superior to) the rights granted to the Stockholders in this Agreement.

(g) Rule 144 Requirements.

After the earlier of (i) the closing of the sale of securities of the Corporation pursuant to a Registration Statement or (ii) the registration by the Corporation of a class of securities under Section 12 of the Exchange Act, the Corporation agrees;

(i) to comply with the requirements of Rule 144(c) under the Securities Act with respect to current public information about the Corporation;

(ii) to use its best efforts to file with the Commission in a timely manner all reports and other documents required of the Corporation under the Securities Act and the Exchange Act (at any time after it has become subject to such reporting requirements); and

(iii) to furnish to any holder of Registrable Shares upon request (i) a written statement by the Corporation as to its compliance with the requirements of said Rule 144(c), and the reporting requirements of the Securities Act and the Exchange Act (at any time after it has become subject to such reporting requirements), (ii) a copy of the most recent annual or quarterly report of the Corporation, and (iii) such other reports and documents of the Corporation as such holder may reasonably request to avail itself of any similar rule or regulation of the Commission allowing it to sell any such securities without registration.

(h) Mergers, Etc.

The Corporation shall not, directly or indirectly, enter into any merger, consolidation or reorganization in which the Corporation shall not be the surviving corporation unless the surviving corporation shall, prior to such merger, consolidation or reorganization, agree in writing to assume the obligations of the Corporation under this Agreement, and for that purpose references hereunder to "Registrable Shares" shall be deemed to be references to the securities which the Stockholders would be entitled to receive in exchange for Registrable Shares under any such merger, consolidation or reorganization; provided, however, that the provisions of Section 14.2(h) shall not apply in the event of any merger, consolidation or reorganization in which the Corporation is not the surviving corporation if the Stockholders are entitled to receive in exchange for their Registrable Shares consideration consisting solely of (i) cash, (ii) securities of the acquiring corporation which may be immediately sold to the public without registration under the Securities Act, or (iii) securities of the acquiring corporation which the acquiring corporation has agreed to register within (90) days of completion of the transaction for resale to the public pursuant to the Securities Act.

(i) Exception to Registration.

The Corporation shall not be required to effect a registration under this Agreement if (i) in the written opinion of counsel for the Corporation, which counsel and the opinion so rendered shall be reasonably acceptable to the Stockholders holding Registrable Shares, such Stockholders may sell without registration under the Securities Act all Registrable Shares for which they requested registration under the provisions of the Securities Act and in the manner and in the quantity in which the Registrable Shares were proposed to be sold or (ii) if the Corporation determines in its good faith judgment that the use of any prospectus would require the disclosure of material information that the Corporation has a bona fide business purpose for preserving as confidential or the disclosure of which would impede the Corporation's ability to consummate a transaction which the Corporation is not otherwise required by applicable securities laws or regulations to disclose. Upon written notice of such determination by the Corporation, the rights of

the Stockholders to offer, sell or distribute any Registrable Shares or to require the Corporation to take action with respect to the registration or sale of any Registrable Shares pursuant to this Agreement shall be suspended until the date upon which the Corporation notifies the Stockholders in writing (the "Suspension Termination Notice") that suspension of such rights for the grounds set forth in this Section 14(i) is no longer necessary. The Corporation agrees to give Suspension Termination Notice as promptly as practicable following the date that such suspension of rights is no longer necessary (but in any event any such suspension shall be effective for a period not in excess of 180 days in any calendar year). If the Corporation shall give any Suspension Termination Notice, the time periods set forth above within which the Corporation is required to take any action to register Registrable Shares shall be extended by the number of days during which the period from and including the date of the giving of such notice of suspension to and including the date the Corporation delivers the Suspension Termination Notice.

The Stockholders each agree not to offer, sell, contract to sell or otherwise dispose of any Registrable Shares, or any securities convertible into or exchangeable or exercisable for Registrable Shares during ay period when, and to the same extent that, any officers of the Corporation are restricted in connection with an offering of securities by the Corporation; provided that nothing herein contained shall be deemed or construed to require a Member to so refrain from disposing of any securities of the Corporation acquired by it other than by reason of the issuance of the Commom Units and conversion thereof into Common Stock during any such period of time, if any such sale shall be pursuant to a private placement to a Qualified Institutional Buyer within the provisions of Rule 144A promulgated under the Securities Act or is consummated with the limitations of Rule 144 promulgated under the Securities Act. The Corporation shall give reasonable advance notice to each such Stockholder of such offering, which notice shall state in reasonable detail whether or not the Corporation believes the agreement herein contained to refrain from selling or otherwise disposing of Registrable Shares or any securities convertible into or exchangeable or exercisable for such Registrable Shares is applicable to such Stockholder.

(j) Listing Application.

If shares of any class of stock of the Corporation shall be listed on a national securities exchange, the Corporation shall, at its expense, include in its listing application all of the shares of the listed class then eligible for listing owned by any Stockholder.

(k) Damage.

The Corporation recognizes and agrees that the holder of Registrable Shares shall not have an adequate remedy if the Corporation fails to comply with the provisions of this Agreement, and that damages will not be readily ascertainable, and the Corporation expressly agrees that in the event of such failure any Stockholder shall be entitled to seek specific performance of the Corporation's obligations hereunder.

(l) Termination.

All of the Corporation's obligations to register Registrable Shares under this Agreement shall terminate on the fifteenth anniversary of this Agreement.

(m) Transfer of Rights.

The rights and obligations of each Stockholder hereunder, may be assigned by such Stockholder to any person or entity acquiring Registrable Shares owned by such Stockholder, and such transferee shall be deemed a "Stockholder" for purposes of this Agreement. Any Registrable shares owned by a transferee hereunder who acquired such Registrable Shares pursuant to a Permitted Transfer, shall be deemed to be owned, for all purposes of this Agreement, by a member of the Stockholder group of which the transferring Stockholder is or was a member.

COUNTERPART SIGNATURE PAGE

FOR

LIMITED LIABILITY COMPANY OPERATING AGREEMENT

OF

NANO TEKNOLOGIES LLC

IN WITNESS WHEREOF, this Agreement has been executed as of the date and year first above written.

Lonnie Lindsey

Red Angel Partners (Jack Illare)

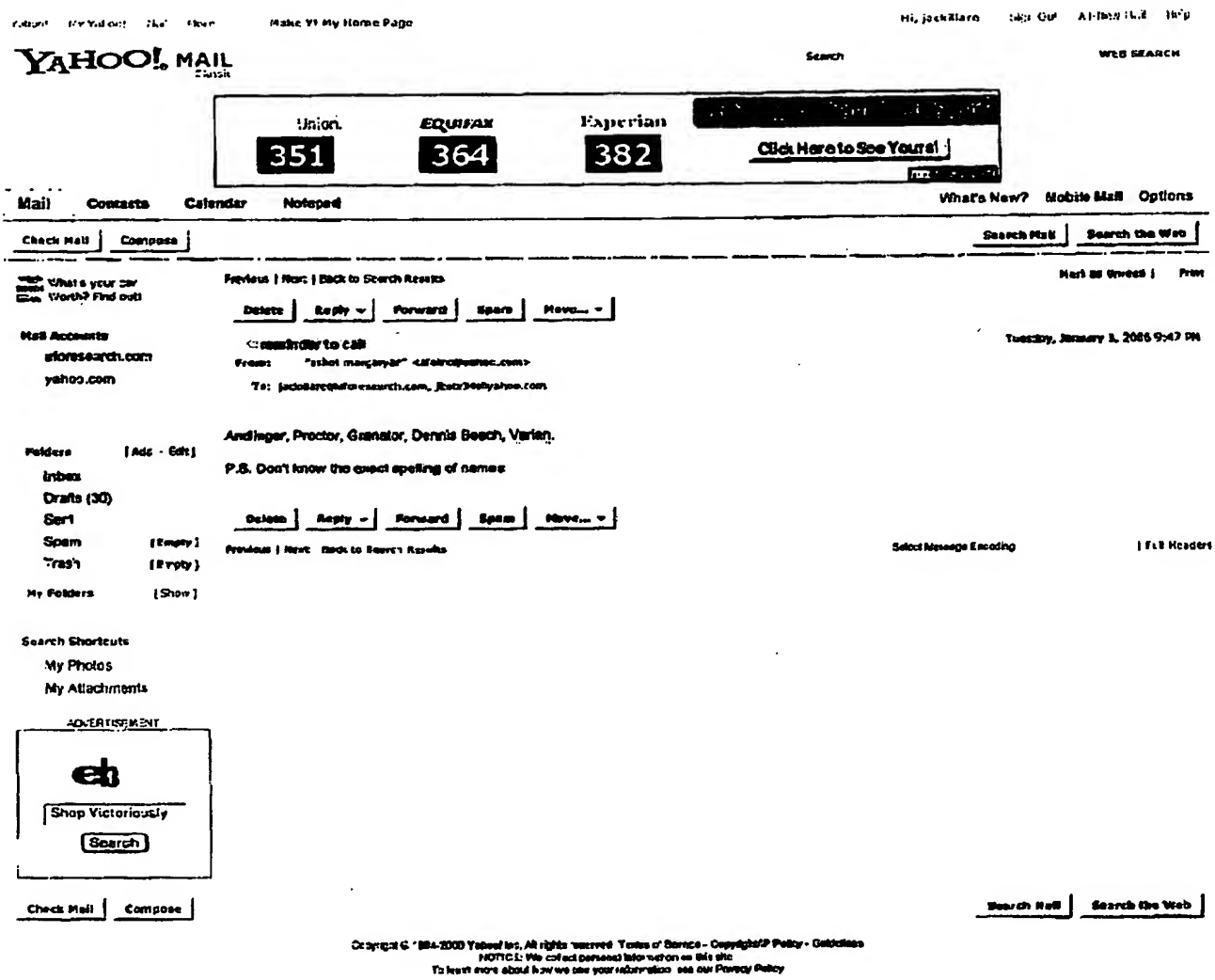
EXHIBIT A
HOLDERS OF FOUNDER COMMON UNITS

Lonnie Lindsey	
Randy Lukasik	
Jack Hare	
Phil Fechtmeyer	
Total Founder Membership Units	**6,900,000**

EXHIBIT B
HOLDERS OF INVESTOR COMMON UNITS

Red Angel Partners

Total Investor Membership Units 100,000


Make Y! My Home Page
Hi, jackblare
Sign Out
Help
YAHOO! MAIL
Search
WEB SEARCH
Union 351
EQUIFAX 364
Experian 382
Click Here to See Yours!
Mail
Contacts
Calendar
Notepad
What's New?
Mobile Mail
Options
Check Mail
Compose
Search Mail
Search the Web
What's your car Worth? Find out!
Previous | Next | Back to Search Results
Mark as Unread
Print
Delete
Reply
Forward
Spam
Move...
Mail Accounts
aforesearch.com
yahoo.com
reminder to call
Tuesday, January 3, 2006 9:47 PM
From: "ashot mançaryan" <
To:
Folders [Add - Edit]
Inbox
Drafts (30)
Sent
Spam [Empty]
Trash [Empty]
My Folders [Show]
Andlager, Proctor, Granator, Dennis Beech, Varian.
P.S. Don't know the exact spelling of names
Delete
Reply
Forward
Spam
Move...
Previous | Next Back to Search Results
Select Message Encoding
Full Headers
Search Shortcuts
My Photos
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ADVERTISEMENT
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Search
Check Mail
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